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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1108

CHAMBERSBURG BROADCASTING COMPANY, *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

HARRY J. DALY
529 Pennsylvania Building
Washington, D. C. 20004
Counsel for Petitioner

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on December 6, 1966.

OPINIONS BELOW

The Initial Decision of the Hearing Examiner of the Federal Communications Commission (R. 10-24) is unreported. The Decision of the Commission's Review Board (R. 25-42) is unofficially reported at 6

Pike & Fischer Radio regulations 2d 33. The Memorandum Opinion and Order of the Commission (R. 46-48) is unofficially reported at 6 Pike & Fischer Radio Regulations 2d 533. The Opinion of the Circuit Court of Appeals (R. 49-52), printed in Appendix A hereto, *infra*, is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 6, 1966 (R. 53; Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The pertinent provisions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 USC § 151, *et seq.* are set forth at Appendix C, *infra.*

QUESTIONS PRESENTED

1. May a Rule of the Federal Communications Commission be used to deny the grant of a broadcast application when the facts of the case show the grant to be in the public interest, convenience and necessity under the Communications Act of 1934, as amended?

2. May the Federal Communications Commission decide similar cases with opposite results by relying solely upon factual differences, without explaining the relevance of those differences to the purposes of the Communications Act of 1934, as amended?

3. May the Federal Communications Commission refuse to consider the competitive disadvantages of one broadcast licensee with another, when it could have repaired the disparity at least in part?

STATEMENT

Petitioner, Chambersburg Broadcasting Company (hereinafter called WCHA) is the licensee of Radio Station WCHA, Chambersburg, Pennsylvania, operating on 800 kc/s, with a power of 1 kw, daytime hours, only. (R. 25) Station WCHA is one of two standard broadcast stations located at Chambersburg, the other being station WCBG [1] which now operates on 1590 kc/s, with a daytime power of 5 kw and a nighttime power of 1 kw.

WCHA's frequency is assigned to the United Mexican States as a clear channel. Before 1961, stations in this country, such as WCHA were restricted in their operation to a maximum power of 1 kw, for operation daytime only, on 800 kc/s. In 1961, by Treaty between the United States of America and the United Mexican States [2] stations on 800 kc in the United States were permitted to increase power to a maximum of 5 kw, still restricting operation to daytime hours in our country. In 1961, WCHA filed the instant application to increase power to the maximum of 5 kw (R. 42-43). Shortly thereafter the licensee of Station WCBG (WCHA's local competitor) filed its application to extend its hours of operation from daytime, only, to daytime and nighttime (R. 36, footnote 1). Both WCHA and WCBG petitioned to deny the application of the other, each alleging that the other violated the Com-

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[1] Station WCBG is licensed to Reese Broadcasting Corporation (R. 36, footnote 1) and is sometimes referred to herein as Reese.

[2] "Agreement Between the United States of America and the United Mexican States Concerning Radio Broadcasting in the Standard Broadcast Band, January 29, 1957, 12 U.S.T. and O.I.A. 734, T.I.A.S. 4777 (effective June 9, 1961) (Pertinent section printed at Appendix D, *infra*).

mission's "ten percent rule", 47 CFR 73.28(d)(3)[3] (R. 36, footnote 1). Briefly, "the ten percent rule" provides that applicants should show that their proposals serve 90 per cent or more of the people within the applicant's normally protected contour; or, to say it differently, applicants may receive interference from other stations up to a count of 10 per cent of the population within the applicant's normally protected contour. The normally protected contour is that which a station would serve in the absence of any objectionable interference. The Chambersburg application exceeded this 10 per cent by 3.7 per cent; the WCBG application by 8.6 per cent. (R. 36, 40)

The Rule itself provides for certain exceptions. (See Appendix E, *infra*), and, additionally can be, and has been, waived by the Commission on a case by case basis. (R. 22; 32-33) As stated, *supra*, the WCBG (Reese) proposal received interference affecting 18.6 per cent of the population within its normally protected nighttime contour; the instant WCHA proposal received interference affecting 13.7 per cent of the population within its normally protected daytime contour. WCBG, therefore, was allowed over 25 per cent greater interference (in population) than the Petitioner, WCHA.

In 1963, the Commission granted the WCBG application, without hearing; WCHA, this Petitioner, sought reconsideration of that Commission action, alleging that the WCBG proposal was not efficient, and, that the sole reason for the grant was because WCBG

[3] The provisions of 47 CFR 73.28(d) are set forth at Appendix E, *infra*. This Rule is often referred to as the "ten percent rule", and will be so identified herein.

complied with an exception to said "ten percent rule" [R. 36-37, footnote 1]. This contention was denied by the Commission; the Commission stated, in part: [The WCBG proposal is granted because] . . . of the low population loss of only 18.6 per cent [and therefore] . . . would not suffer interference to such an extent that its service would be reduced to an unsatisfactory degree. The Commission reaffirms its findings that the proposal is an efficient use of the frequency as contemplated by Section 3.24(b) [47 CFR & 73.24 NOTE (b)] [4] of the Rules (R. 37, footnote 1). Yet the WCBG proposal exceeded the 10 per cent interference acceptable in all applications by more than twice as much as the Petitioner's proposal.

In 1964, the Petitioner's application for increased power was designated for consolidated hearing with three other applicants, all proposing operation on 800 kc/s, due to interlocking interference among them, and, with respect to WCHA, whether it complied with the "ten percent rule", and, if not, whether the rule should be waived [R. 25; 10-11]. WCBG (Reese) was made a party based upon its claim of economic injury if the WCHA proposal were to be granted (R. 9). However, it offered no evidence in this regard, at hearing. In his Initial Decision the Hearing Examiner recommended a grant of all four applications; the Examiner found WCHA would receive over 10 per cent interference, but concluded a waiver of the "ten percent rule" was warranted (R. 25). The Examiner

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[4] For text of Rule see Appendix E, *infra*. Applicants complying with an exception to 47 CFR 73.28(d)(3) are nevertheless obliged to comply with the provisions of 47 CFR 73.24 NOTE (b) (R. 22).

relied, in part, upon the following material evidence:[5] a grant of WCHA's proposal will not *per se* prevent use of either the frequency 800 kc/s or of any adjacent frequencies, by any existing or proposed station (R. 22-3); a grant will provide new service to more than 200,000 persons, and, that the persons to gain service have strong ties with Chambersburg; (R. 24); that WCHA, with increased power, will be the only Chambersburg station[6] by means of which Chambersburg and Franklin County employers can advise their numerous employees within the new area to be served by WCHA (referred to as "gain area") of work cancellations; and, that it will be the only readily available radio facility by means of which employers in Chambersburg and Franklin County can make known to the more than 200,000 persons (within 2,960 square miles) that there are opportunities for employment in the growing economic activities in Chambersburg and Franklin County (R. 24) (and that this is important since Chambersburg is the hub of significant portions of the "gain area," and that significant portions of the "gain area" include economically depressed areas within Appalachia) (R. 17-18).

WCBG (Reese) and the Commission's Broadcast Bureau filed Exception to the Examiner's Decision (R. 25; 26), and by a vote of two to one (Board Member Kessler dissenting) the Commission's Review Board concluded that a waiver of the "ten percent rule" was not justified and reversed the Hearing Examiner and denied the Petitioner's (WCHA) application. [R.

[5] The conclusions reached by the Examiner are set forth verbatim at R. 21-24.

[6] Station WCBG, the other Chambersburg station serves no part of the WCHA proposed "gain area" (R. 32).

25-42]. In its Decision the majority of the Board did not direct itself to the circumstances surrounding the previous grant of the WCBG application and did not discuss the competitive position with WCHA. (R. 25-35). These points were covered by Board Member Kessler who voted for a waiver of the Rule and a grant to WCHA, your Petitioner (R. 35-42). By and large, the Review Board adopted the Hearing Examiner's findings (as summarized, *supra*) (R. 26), but refused a waiver of the "ten percent rule". The Board noted that the "ten percent rule" was adopted by the Commission to achieve an optimum balance between excessive interference and a too restricted use of the frequency and to prevent a degradation or deterioration of existing service (R. 28). While conceding that the only interference which would be caused by a grant to WCHA was minimal (resulting in interference to Station WKDN Camden, New Jersey to .02 per cent of the population within WKDN's normally protected contour) (R. 27), the Review Board concluded that the "ten percent rule" is to be waived only for unusual and compelling reasons (R. 28), which the Board refused to find in this case. Respecting WCHA's showing and the Hearing Examiner's conclusions, to the effect that a grant of the WCHA proposal would not have any real adverse effect on existing or future stations in the whole broadcast band, the Review Board thought these facts to be of negative rather than positive value (R. 29). Respecting WCHA's proposed service to economically depressed areas, the Review Board took the position that these areas are not really close to Chambersburg, and that portions of the depressed areas to be served were closer to other cities with radio stations than your Petitioner. The Board noted that

WCHA did not, (nor did any party, nor did the Commission itself) offer evidence that the stations in such other cities "have not or could not fulfill the needs which WCHA contends its proposal alone can meet".[7] (R. 32). The Board lists minor factual differences but no legal distinctions respecting Commission cases relied upon by WCHA and wherein the "ten percent rule" was waived and the Board did not relate those differences to the purposes of the "ten percent rule", or the Communications Act of 1934, as amended, *supra.* (R. 28-33).

The Petitioner, WCHA filed an Application for Review of the Decision of the Review Board to the Commission *en banc* (R. 42-44). The Commission accepted the Petition for the limited purpose of listing some differences between one Commission case (*Thomas County Broadcasting Co., Inc., infra*) wherein a waiver of the "ten percent rule" was granted, and upon which WCHA had relied as precedent for a waiver of its proposal, but in all other respects upheld the Board's Decision and denied the WCHA proposal (R. 46-48). The Commission did not attempt to relate the factual differences between that case, and the instant case to the purposes of the "ten percent rule", nor the Communications Act of 1934, as amended, *supra,* nor did it consider the question of the competitive position of your Petitioner arising from the previous grant to WCHA's local competitor, WCBG (R. 46-48), which was advanced by WCHA in its Application for Review (R. 43-44). Two of the seven Commissioners voted for a grant of WCHA's proposal (R. 46).

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[7] There was no designated issue on this point (R. 10-11; the issues not reproduced in the Record at pages 10 and 11 are irrelevant to the WCHA application).

Pursuant to Section 402(b) of the Communications Act of 1934, as amended, 47 USC § 402(b), WCHA filed a timely appeal to the Court of Appeals for the District of Columbia Circuit. That Court, in its Opinion of December 6, 1966 (R. 49-52) considered WCHA's argument respecting the previously referred to grant to WCHA's competitor, WCBG, but found nothing unfair in the Commission's treatment of your Petitioner, WCHA, since it held, while WCHA required a wavier of the "ten percent rule", WCBG came within an exception to that rule. Respecting the Commission's failure to waive the "ten percent rule", for the other reasons advanced by WCHA, the Court below concluded without detailed discussion, that its study of the record disclosed to its satisfaction that the Commission had not acted arbitrarily nor in violation of procedural safeguards, and that it would not substitute its judgment for that of the Commission, citing previous cases in that Court, affirming past Commission decisions denying waivers of the "ten percent rule". This Petition follows.

REASONS FOR GRANTING THE WRIT

The Federal Communications Commission is required by the Communications Act of 1934, as amended, to make grants of broadcast licensees in the public interest, convenience and necessity and to encourage, generally, the larger and more effective use of radio. 47 USC § 303(g), 307(a), 309(a) (See Appendix C).

In this case, however, the Commission rigidly applied one of its Rules[8] to deny Petitioner's application, substituting, in effect, the Rule itself for the mandate

[8] 47 CFR 73.28(d), *supra.* (See Appendix E)

of the statute. Such action is contrary to a basic principle set down by the Court in *National Broadcasting Company* v. *United States,* 319 U.S. 190, 225 (1942) and re-intereated in *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, 205 (1956), to wit:

> "The [Federal Communications] Commission . . . did not bind itself inflexibly to the licensing policies expressed in the Regulations. In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the 'public interest, convenience, or necessity'. If . . . circumstances reveal that the 'public interest' is not served by application of t he Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations."

If, in this case, the Commission looked beyond its Rule, and to the purposes of the statute, it would have granted Petitioner's application.

The radio spectrum is a natural resource of the United States. Its misuse or waste is of national importance. In this case if the Petitioner is denied the use it proposes, no one else may enjoy the use so lost. The present use of WCHA, your Petitioner, precludes others from using that which WCHA is using as well as the additional use WCHA now proposes. (R. 35-36)

Place the facts in this case beside the Act and the clear import of the Act requires a grant. There is no way to satisfy both the Act and the Rule, in this case, and, therefore the Rule must yield. See *National Broadcasting Company* v. *United States, and United States* v. *Storer Broadcasting Co., supra.*

The Commission concedes the accuracy of all of the points advanced by Petitioner favoring a grant of im-

proved facilities to station WCHA, including: its great increased service (an additional 200,000 people reached with additional service) (R. 26-27); service to areas within economically depressed Appalachia whose residents need help from the State Employment Service located in Chambersburg (R. 19, 24);[9] dissemination of information to new populations who have strong ties with Chambersburg (R. 24); maximum utilization of its frequency, 800 kc/s (R. 29); and all with only a minimal amount of interference to only one existing station, which station, WKDN (Camden) agreed to accept it. (R. 38)

WCHA now receives some interference but it proposes to serve greater areas and twice as many people; but by expanding its contours with more power it would receive more than the 10 per cent interference generally allowable, i.e. 13.7 per cent. (This is interference to populations within the proposed normally protected contour, which populations WCHA does not now serve, nor could it serve because of already established stations.) In these matters stations come within the Commission's Rules if the stations receive, to themselves, interference to populations amounting to 10 per cent of the populations within the normally protected contour. WCHA's proposal would be in excess of this 10 per cent amount only by 3.7 per cent, a minor amount.

The "ten percent rule" was enacted to prevent substandard broadcast grants, to prevent the degradation of service to other stations, and to avoid a "too restricted use of the frequency". (R. 28, 37). There

[9] The Review Board improperly speculated on the possibility of other stations giving this service. No one, not even the Commission offered evidence that any other station could or would render this service.

would be no degradation of service in this case, for WCHA would give no interference to any station, except only very slight interference to WKDN (Camden), which WKDN agreed to accept, and which the Commission characterized as minimal, *supra*. Nor will the grant of Petitioner's proposal result in a restriction of the use of its frequency or any other frequency. If WCHA proposed to lessen its services or reduce its power, then it might be claimed the proposal could become a "too restrictive use of the frequency", or a substandard station. But in this case WCHA proposes to increase its service on its presently licensed frequency. The station operates, now, with only 20 per cent of the power proposed. (R. 25). It now serves less than one-half of the population it proposes to cover. (R. 26-27). The Commission approved this smaller use of the frequency when it granted WCHA's present license. WCHA now moves in the opposite direction of restricted use, to a much better, fuller use.

Moreover, despite the close similarity of this case with other cases in which the Commission has waived the "ten percent rule" (the *Thomas County* and *Stevens* cases, *infra*), at no point in this case has the Commission shown how this inconsistent decision is related to the purposes of the Communications Act. (R. 25-35; 46-48) The Court below, correctly, we think, imposed such a requirement in *Melody Music Inc.* v. *Federal Communications Commission,* 345 F. 2d 730 (1965), and we submit that that requirement should be imposed in this case. The importance of this cannot be overstated for as decisions are made by the Commission, and Rules are enacted, it becomes harder and harder to determine just where in the Act the authority lies. We are firm in our belief that had the Commission

undertaken to relate its decision to the purposes of the Act, WCHA would have won its case.

Before preparing an application to present to the Federal Communications Commission, an applicant should be able to receive a reasonable opinion of the outcome of his application, based on the facts of his particular case. True, time, scientific advancement, changes in policy, or even a change in law or Commission Rules, could result in permissible departure from precedent, see *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223 (1946); however where, as here, the Commission, without any Rule change, policy change, or change in the law, and at approximately the same point in time waived its "ten percent rule" in two strikingly similar cases, *Thomas County Broadcasting Co. Inc.*, 35 FCC 525 (1963), 1 Pike and Fischer Radio Regulations 2nd 376 and *Stevens County Broadcasting Co.*, 30 FCC 921 (1961), 21 Pike and Fischer Radio Regulations 414,[10] it was obliged to afford WCHA equal treatment. *Melody Music Inc.* v. *Federal Communications Commission, supra.*

The Commission's Hearing Examiner, who recommended a waiver of the "ten percent rule" in this case, and a grant of the WCHA application points out the

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[10] These two Commission cases were relied upon, heavily, by WCHA in support of its request for waiver of the "ten percent rule". In *Thomas County*, the interference received amounted to 16.16 per cent; in *Stevens*, 11.6 per cent. Other Commission cases relied upon by WCHA wherein the Commission waived the "ten percent rule", include *Old Belt Broadcasting Company, Inc.*, 30 FCC 1067 (1961), 20 Pike and Fischer RR 1035, *Alexanderia Broadcasting Corporation*, 31 FCC 755 (1961), 22 Pike and Fischer RR 411; *Minnesota Valley Broadcasting Company*, 11 Pike and Fischer RR 1080; *Suburban Broadcasting Company Inc.*, 31 FCC 16 (1961), 20 Pike and Fischer RR 375 (R. 29, 32-33).

similarities between this case and the *Thomas County* and *Stevens* cases and relies upon those cases as precedent for the grant to WCHA (R. 22-24). Also, in her dissenting opinion, Board Member Kessler states unequivocally that she found no basic distinction between the facts in the instant case and those in *Stevens* (R. 42). The Board's majority and the Commission, while defending the decisions in *Thomas County* and *Stevens,* list what Petitioner believes to be insignificant factual differences rather than legal distinctions (R. 32-3; 47-8). Petitioner respectfully submits that the Commission, in refusing to follow in this case, its rationale in *Thomas County* and *Stevens* failed to administer the Act fairly and rationally. *Burinskas* v. *National Labor Relations Board,* 357 F. 2d 822 (1966); *Melody Music Inc.* v. *Federal Communications Commission, supra.* Moreover it has violated the fundamentals of administrative fair play, a principal set forth by this Court in *Federal Communications Commission* v. *Pottsville Broadcasting Company,* 309 U.S. 134, 143-4 (1939).

The English economic system, years ago, encouraged by precedent law, flourished; and applicants before the Commission are entitled to the comfort of precedent following by the Commission in the preparation and processing of their proposals before the Commission.

An important reason for the Court to consider this case is the fact that the Commission could have and should have reduced the competitive broadcasting gap in Chambersburg, Pennsylvania. As set forth in the Statement, *supra,* there are only two standard broadcast stations located at Chambersburg, WCHA and WCBG. About the same time each requested the Com-

mission to increase its facilities.[11] Each protested the grant of the other, each alleging that the other violated the "ten percent rule" (R. 36, footnote 1). The two stations originally were daytime only; when Reese (WCBG) received its grant without hearing and over the objection of WCHA, WCBG then became a full-time station (i.e. with nighttime operation) (R. 36, footnote 1). WCHA was left a low powered station restricted to daytime hours of operation. WCHA now proposes a daytime increase in power, which, if received, would help to make WCHA more competitive with WCBG.[12]

WCBG (Reese) received 18.6 per cent interference at night, thus exceeding the allowance of the "ten percent rule". However, since it was to provide a first local nighttime outlet at Chambersburg, it came within an exception to the Rule [47 CFR 73.28(d)(3); See Appendix E]. WCHA sought reconsideration of the WCBG grant, alleging that the WCBG proposal was inefficient and was granted only because of the exception to the "ten percent rule" (R. 36-37, footnote 1). The Commission flatly rejected this contention, indicating that it granted the WCBG proposal "because of the low population loss of 18.6 per cent" and that the WCBG was "an efficient use of the frequency as contemplated under Section 3.24(b) of the Rules (47 CFR 73.24 Note (b); Appendix E) (R. 36-37, footnote 1).

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[11] The WCHA and WCBG proposal did not involve interference one to another for different frequencies were involved. However, they were and are in competition, for advertising revenues (R. 37).

[12] By Treaty, entitled "Agreement Between the United States of America and the United Mexican States Concerning Radio Broadcasting in the Standard Broadcast Band", January 29, 1957, 12 U.S. T. & O.1A. 734, T.1.A.S. 4774 (effective June 9, 1961) certain class II stations including WCHA, on 800 kc/s were authorized to increase *daytime* power to 5 kilowatt but still could not be authorized for nighttime service.

Rules 47 CFR 73.24(b) and 73.28(d) both involve the question of interference of efficiency (Compare the Rules at Appendix E). It was inequitable therefore, for the Commission to judge two stations, competing for revenues in the same community, by separate Rules when each presented the Commission with substantially the same engineering problem in their applications (See *Melody Music Inc.* v. *Federal Communications Commission, supra*) and where no public interest reasons were cited to justify the inequitable competitive position in which it placed WCHA (See *American Broadcasting Paramount Theaters Inc.* v. *Federal Communications Commission,* 345 F. 2d 954 (1965). The Commission should have waived the "ten percent rule" for WCHA or decided the case by the same standard applied to WCBG, the local competitor. It failed to do either. It did not consider the vital competition question at all. The Commission refused to lessen the gap in competition which easily it could have and should have done.

The Commission's Examiner who heard the evidence and saw the witnesses decided to grant the facilities requested by WCHA. The Commission's Review Board and Commission reversed, but there was published with the Decision of the Review Board the strong dissent of Board Member Kessler who, we believe, placed this case in proper prospective. She wrote in part: (R. 39-40)

> "For it is clear that this uncontroverted evidence establishes that (a) there will be no *substantial* degradation or deterioration of existing service; (b) the applicant's proposal does not conflict with the Commission's stated intention when it adopted the "ten percent rule" and it would not pursue a policy which would result in *substantial* degradation or deterioration of existing service;

and (c) the applicant's proposal does not work at cross-purposes to the Commission's basic station assignment goals. (Emphasis supplied by Board Member Kessler).

"I further believe that the Board's decision falls far short of weighing the public interest benefits to be derived from WCHA's proposal, as against public interest detriments adversely affecting the Commission's basic station assignment goals. *Cf. FCC* v. *Pottsville Broadcasting Company,* 309 U.S. 134. As indicated above, I do not believe that there are any such public detriments, except the *de minimis* (0.2 per cent) interference to WKDN. However, these are the substantial public interest benefits: (a) maximum utilization of the frequency by WCHA; (b) expansion of WCHA's coverage area to parts of the depressed area of "Appalachia" not now served by WCHA; (c) some specialized types of programs designed specifically for the distressed areas of "Appalachia"; and (d) improvement of competition between the only two AM stations in Chambersburg . . . WCBG is an unlimited time station, operating with 5 kw power during the daytime. Although its frequency of 1590 kc may not be considered as desirable as that of WCHA's 800 kc frequency, nevertheless, WCBG operates unlimited time, whereas, WCHA is a daytime station now operating with only 1 kw power."

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition should be granted.

Respectfully submitted,

HARRY J. DALY
529 Pennsylvania Building
Washington, D. C. 20004
Counsel for Petitioner